83-1322
NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOULA O'BANNON

Petitioner

versus

DR. ROBERT AZAR

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOURTH CIRCUIT, STATE OF LOUISIANA AND MOTION TO VACATE THE JUDGMENT BELOW

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Louisiana Revised Statutes 9:396 *et seq.* pertaining to blood testing in paternity proceedings and other Louisiana statutes and jurisprudence which govern evidentiary procedure were constitutionally invalid as applied, thereby denying the petitioner a meaningful opportunity to be heard, all as prohibited by the Due Process Clause of the United States Constitution.

2. Whether the opportunity of illegitimate children to obtain paternal support provided by the State of Louisiana is illusory as compared to the opportunity afforded legitimate children, thereby violating the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

3. Whether an illegitimate child living in Louisiana and suing there to establish paternity can be held to an unreasonably higher standard of proof than illegitimate children in other states who are seeking to establish paternity without violating the Equal Protection Clause of the Fourteenth Amendment.

4. Whether Louisiana state law can impose such constraints upon the proof of paternity so as to effectively emasculate the federal mandate of 45 Code of Federal Regulations 305.24.

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The petitioner Soula O'Bannon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals, Fourth Circuit, State of Louisiana entered in this proceeding on July 8, 1983 and moves this Honorable Court to vacate that judgment.

OPINION BELOW

The opinion of the Court of Appeals, Fourth Circuit, State of Louisiana, appears in the Appendix hereto. The judgment of the Civil District Court for the Parish of Orleans also appears in the Appendix together with the Civil District Court's reasons for judgment.

JURISDICTION

The judgment of the Court of Appeals, Fourth Circuit, State of Louisiana was rendered on July 8, 1983. Rehearing was requested timely but refused on August 23, 1983. A

Petition for Writ of Certiorari was timely filed with the Supreme Court of Louisiana, but writs were denied on November 11, 1983. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3). The federal questions of plaintiff's due process and equal protection rights being violated were raised in both the Court of Appeals, Fourth Circuit, State of Louisiana and the Supreme Court of Louisiana proceedings.

STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION. Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION. Amendment XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LOUISIANA CONSTITUTION, ARTICLE 1

SECTION 1. All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. It only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be perserved inviolated by the state.

SECTION 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

LOUISIANA REVISED STATUTES 9:396 et seq.

396. Notwithstanding any other provision of law to the contrary, in any civil action in which paternity is a relevant fact, or in an action en desaveu, the court, upon its own initiative or upon request made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interest of justice so require.

397. The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses

to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court.

LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 1634

Any party or his representative may be called as a witness and cross-examined by the adverse party without the latter vouching for his credibility, or being precluded from impeaching his testimony, and immediately thereafter the witness thus called may be examined or cross-examined to the extent otherwise permitted by law upon the subject matter of his examination in chief by such adverse party. The court may permit the recall and further cross-examination of the party or of his representatives as often as it deems such action to be in the interest of justice.

'Representative' as used in the paragraph above and in Article 1428 (2) means an officer, agent or employee having supervision or knowledge of the matter in controversy, in whole or in part, whether or not he is in the employ of or connected with the party at the time his testimony is taken.

45 CODE OF FEDERAL REGULATIONS 305.24

For the purposes of this part, in order to be found to be in compliance with the State plan requirement that the State undertake the establishment of paternity (45 CFR 302.31(a) and 302.33), a State must:

(a) Have established and be utilizing written procedures for obtaining the identity of the putative father from the applicant or recipient;
(b) Have written procedures for establishing paternity;

(1) By Court order or other legal process established by State law; and,
(2) By acknowledgment, if under State law such acknowledgment has the same legal effect as court ordered paternity, including the rights to benefits other than child support;
(c) Be utilizing such written procedures to establish the paternity of any child born out of wedlock whose paternity has not previously been established and with respect to whom there is an assignment in effect pursuant to 232.11 of this title or with respect to whom there is an application for child support services pursuant to 302.33 of this chapter;
(d) Have identified and made a list of all laboratories within the State which, in the opinion of the IV-D agency, perform legally and medically acceptable tests, including blood tests, which tend to confirm or refute the alleged paternity, and have made such list available to appropriate court and law enforcement officials, and to the public upon request:
(e) Have identified all State statutes and regulations that provide procedures to be used in determining the paternity of a child born out of wedlock as required by 302.17 of this chapter;
(f) Have available attorneys or prosecutors to represent the State in court or administrative proceedings when necessary with respect to the establishment of paternity; and
(g) Have personnel, such as interviewers, investigators, clerical and other support staff performing paternity establishment functions.

STATEMENT OF THE CASE

The petitioner Soula O'Bannon, an unmarried woman gave birth to a boy on April 22, 1980. Thereafter, on October 22, 1980, she filed suit in the Civil District Court for the Parish of Orleans to establish paternity and to seek child support from the alleged father, Dr. Robert Azar.

Both petitioner and respondent filed motions pursuant to La. R.S. 9:396 asking that an expert be court appointed to conduct blood tests. The trial court originally appointed a physician, a Dr. Sal Caputo who declined the appointment, citing lack of expertise in this area. No other expert was ever appointed by the court.

Approximately ten days before the trial was to commence, several motions were brought before the trial court which are of importance to this Court. The petitioner filed a motion to compel answers to questions which had been unanswered by a Dr. Sharon Doud. Dr. Sharon Doud was a physician who claimed at her deposition that she performed a vasectomy on the alleged father, Dr. Azar, in her home in Westfield, New York one weekend in April of 1979. This date would have antedated the conception period by approximately three months.

Secondly, petitioner Soula O'Bannon filed a motion to continue the impending trial based upon the fact that the respondent's expert witness in paternity testing, Dr. Steckler, was unavailable for deposition by the petitioner prior to trial.

At the hearing on these pre-trial motions (which were duly transcribed), the respondent's counsel argued on behalf of Dr. Sharon Doud that Dr. Doud should not be compelled to answer any more deposition questions. Further,

counsel argued against the trial's continuance by representing to the Court and to petitioner's counsel that although Dr. Steckler had not been available for deposition. Dr. Steckler would only be doing his own statistical calculations or variables of the HLA tests and not any new tests. Tr. Transcript Vol. IV. pp. 24-25.

On that representation, the trial judge denied petitioner's motion for a continuance, asserting that he felt no prejudice would lie against the petitioner. However, the trial judge stated that in the event paternity testing evidence was introduced by the respondent, at trial, which was detrimental to the petitioner, the petitioner would be given the time and right at trial to rebut such evidence, which had not been made available. (Tr. Transcript Vol. IV., pp. 24-26.)

The trial judge also denied petitioner's Motion to Compel more information from Dr. Sharon Doud as to the whereabouts of her former husband, whom she testified was out-of-town when she allegedly performed the vasectomy on Dr. Robert Azar.

The trial then commenced. At trial, the petitioner called to testify as her paternity testing expect, Dr. Leslie Ray Bryant, a well-recognized and eminently well-qualified physician in paternity testing. Dr. Bryant had been appointed by the trial judge previously in numerous paternity proceedings to render an expert opinion on the probabilities of paternity, as well as the exclusionary aspects of the blood grouping and HLA tests. Dr. Bryant, after adhering strictly to all of the procedures set forth in the Joint AMA-ABA Guidelines on serological testing, concluded, in his expert opinion, that the probability of the respondent being the father was 99.91%, using the red blood cell tests and the HLA test. This was largely due, in part, to an extremely rare haplotype, Number 37, being present in the alleged father and in the son, the haplotype not being present in the mother.

Additionally, in the petitioner's presentation of evidence, she called Dr. Sharon Doud to cross-examine her. The trial court would not allow petitioner's counsel to cross-examine Dr. Sharon Doud, claiming that he did not find her to be a "representative" of the respondent Azar, nor did he find that she was a "hostile" witness; therefore, petitioner would have to vouch for her credibility. This ruling was made and upheld by the Fourth Circuit Court of Appeal in their opinion, despite the fact that the transcript shows that respondent's counsel, in pre-trial motions, referred to Dr. Sharon Doud as Dr. Azar's witness, that respondent's counsel appeared at pre-trial motions (as shown in the transcript) on Dr. Sharon Doud's behalf, and despite the fact that immediately prior to the trial commencing, respondent's counsel filed on behalf of Dr. Sharon Doud a motion to quash a subpoena duces tecum directed to Dr. Sharon Doud.

Petitioner also called, primarily as a fact witness, Dr. Joseph Bellina, who had been her gynecologist many years prior to her becoming pregnant with her son, Benjamin. The import of Dr. Bellina's testimony was that it revealed that he and the alleged father Dr. Azar had a telephone conversation about the petitioner and her pregnancy. Dr. Bellina testified that Dr. Azar, during the conversation, purported to be a "friend" of the petitioner, Ms. O'Bannon, and inquired into the possibility of her having an abortion due to her mental condition. This conversation was not denied by the respondent. Tr. Transcript Vol. IV, pp. 74-77

Petitioner also called to testify Dr. Robert Doud, Dr. Sharon Doud's former husband. His testimony directly controverted that of this former wife's, in that he testified that he was in Westfield, New York at the time when Dr. Azar was allegedly having a vasectomy performed in the Doud home, and that Dr. Azar was not there.

The respondent then commenced to introduce, in his behalf, the findings of one Dr. Andrew Hegre with respect to an immunoglobulin marker series paternity test he alleged to have run in his own laboratory, by himself, all of which procedures, including the test he claimed to have performed, were not in accordance with the recommended procedure set forth in the Joint AMA-ABA Commission on Serological Testing.

Even prior to the admission of Dr. Hegre's testimony with respect to his particular findings, the petitioner objected to his being qualified as an expert in paternity matters due to the fact that he had never testified before as a paternity expert, and that he claimed to have performed very few sophisticated blood grouping tests.

Subsequent to his being qualified as an "expert" in paternity testing, petitioner objected to the test results, of Dr. Hegre, being introduced (Dr. Hegre apparently had found an exclusion utilizing not the red blood cell series and HLA tests, but an immunoglobulin marker test). The petitioner had not been apprised of the existence of this test or of this particular "expert" until Dr. Hegre testified at trial. Petitioner argued that, as was promised by the trial court at pre-trial motions, she should be afforded, at the very least, an opportunity to have rebuttal testimony heard.

The trial court then held that the petitioner could have an opportunity to run similar tests, but would not compel Dr. Azar, the respondent, to submit to an additional blood test and Dr. Azar refused to voluntarily submit to the tests for the petitioner. Petitioner then sought to have two witnesses to rebut Dr. Hegre's credentials and to rebut the type of immunoglobulin marker paternity tests he utilized. Both witnesses were not allowed to testify either as fact or expert witnesses. The first witness called to testify was

Dr. David deJongh, a board certified physician in blood-banking, Director of Hemo-Therapy at Charity Hospital of New Orleans (which department included bloodbanking, the same area of medicine in which Dr. Bryant was board certified) and Director of the HLA laboratory at Tulane. When questioned about his expertise, he testified that he had conducted hundreds of paternity tests. Dr. deJongh's proffered testimony elicited that Dr. Hegre had consulted with him prior to conducting any paternity test for the parties and that Dr. Hegre had asked Dr. deJongh for assistance because Dr. Hegre did not know how to conduct same. Dr. deJongh further would have testified, if he had been allowed, to the various scientific contradictions present in Dr. Hegre's findings (Tr. Transcript Vol. XI, pp. 295-300). The second rebuttal witness of the petitioner, who was not allowed to testify, was Dr. Thomas Lane, an immunogeneticist. The point of his testimony was to show the general unacceptability of immunoglobulin marker testing for paternity due to the problem of quality of the testing materials and a phenomenum known as allo-suppression.

After the trial testimony was concluded but, before a judgment had been rendered, the petitioner filed a motion requesting the trial court to allow Dr. Herbert Polesky, a nationally recognized paternity testing expert, to testify. The petitioner, immediately after hearing Dr. Hegre's testimony and securing a copy of his written report, believed the report to be in error due to Dr. Hegre's inexperience in the field, and accordingly, sent blood samples of the mother and child (as the father's was not available) to Dr. Polesky.

The basis for the motion was that Dr. Polesky had expressed doubt to petitioner's counsel as to the validity of the immunoglobulin marker tests performed by Dr. Hegre. The trial court denied this motion as well.

Judgment was rendered against the petitioner on May 10, 1982. Petitioner then filed a motion for a new trial based upon the discovery of information concerning the relationship which Dr. Hegre had to the respondent, Dr. Azar, which was not disclosed at trial, and additionally, Dr. Polesky's casting doubt on Dr. Hegre's findings. The motion was denied.

An appeal was filed in the Court of Appeals, Fourth Circuit, State of Louisiana, and the Fourth Circuit rendered its decision on July 8, 1983, affirming the trial court's decision. The Supreme Court of Louisiana denied writs on Nevember 11, 1983.

REASONS FOR GRANTING THE WRIT

"I'll prove this truth with my three drops of blood. . . ."

Shakespeare
Trolius and Cressida
Act I, Scene III

The United States Supreme Court, in recent years, has found a pressing need to establish, definitively, the rights of children born out-of-wedlock The rise in illegitimate births cannot be underplayed or ignored: In Louisiana alone, approximately 20,000 children are born out of wedlock each year and in Orleans Parish, 4 out of every 10 births are without benefit of matrimonial ties.

The questions presented in this petition for writ of certiorari are inextricably interwover, and to try to isolate each question as a separate and distinct issue would be untenable. The reason why the United States Supreme Court must intervene in the area of serological testing and the establishment of other evidentiary standards in paternity litigation

is clear. The potentially explosive societal reaction in some jurisdictions to the use of scientific evidence as the main criterion for establishing paternity has been too uncomfortable a political issue for legislators and judges alike to handle.

In situations just such as this, historically, the United States Supreme Court has had to intervene to guarantee the protection of the Bill of Rights to all individuals, regardless of their race, color, creed, or birth. With these considerations in mind, it is submitted that this petition for writ of certiorari addresses issues which affect a significantly large class of illegitimates, and as such, cannot in the interests of justice, be denied.

I.

The Louisiana Revised Statutes, 9:396 *et seq.*, pertaining to blood testing, in paternity proceedings and other Louisiana statutes and jurisprudence which govern evidentiary procedure were constitutionally invalid, as applied, in this case. The petitioner was thereby denied a meaningful opportunity to be heard, all as prohibited by the Due Process Clause of the United States Constitution.

As outlined in the statement of facts, several procedural rulings made by the trial court against the petitioner resulted in the denial, to the petitioner, of a meaningful opportunity to be heard, thus violating petitioner's due process rights.

This Court has enunciated the far-reaching and flexible parameters of the due process right on numerous occasions. *Morrissey v. Brewer*, 408 US 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972). *Boddie v. Connecticut*, 401 US 371, 28 L.Ed.

2d 113, 91 S.Ct. 780 (1971).

In *Matthews v. Eldridge*, 424 US 319, 335, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976) this court held:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The facts of the case before this Court demonstrate clearly that the blood testing statutes and evidentiary statutes and jurisprudence, generally recognized as valid, were constitutionally invalid as construed and applied. This Court in *Little v. Streater*, 452 US 1, 68 L.Ed.2d 627, 101 S.Ct. 2202 recognizes that the imposition of the obligation of child support requires procedural fairness.

What could be more procedurally unfair than to not give the petitioner the opportunity to introduce the key rebuttal evidence of Drs. deJongh and Lane? Has not the due process right been violated when a party is *promised*, by the trial court, the right to rebut the findings of the medical expert, of the adverse party, when that trial court will not compel the respondent to give an additional blood sample?

What interest does the State have in not allowing evidence,

from nationally recognized experts, which casts grave doubt upon the findings of a "first-time" expert in the field of paternity testing? It is submitted that the State should, in the interests of procedural fairness, mandate the introduction of any evidence which could substantially arrive at the truth and justice.

Louisiana jurisprudence leaves it to the trial court's discretion whether or not to allow rebuttal witnesses. However, due process requires that the trial court not be permitted to cloak itself with judicial discretion when called upon to make an unpopular and equitable decision. This is especially true when this trial court, in pre-trial motions, unambiguously advised the petitioner that she could have the opportunity to rebut the findings of the respondent's expert, if the results were adverse to her.

Further, as the pleadings and transcript demonstrate, the petitioner should have been afforded the right to cross-examine Dr. Sharon Doud as it was abundantly clear that she was a "representative" of the respondent, or at the very least, a hostile witness. La. CCP art. 1634.

Procedural due process evaded the petitioner when the trial court refused to allow Dr. Polesky to testify. It happened again when petitioner was denied a new trial based upon the discovery, by petitioner, of aspects of the relationship between the respondent and Dr. Hegre which were not disclosed at trial. In the interests of procedural fairness, this should not have been allowed to happen.

In further support of petitioner's due process argument, she asserts that the very nature of paternity proceedings in Louisiana, involves the State in two key ways. As such, the state is responsible for any disparity in judicial treatment of the litigants.

First, once a duty to support is imposed on the father of an illegitimate, and that duty is breached by the non-support of that child, then the State may bring criminal charges of neglect against him. Secondly, if the mother of an illegitimate child receives public assistance for that child, then the State may become a party to any paternity proceeding. Although the petitioner was not receiving any public assistance, the ruling of the Fourth Circuit in this case becomes the definitive law, and as such, is binding upon all illegitimates, including those on public assistance seeking to establish paternity.

For these reasons, it is submitted that the petitioner did not receive the process she was constitutionally due.

II.

The opportunity for illegitimate children in Louisiana to obtain paternal support is illusory as compared to the opportunity afforded legitimate children, thereby violating the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution.

In *Mills v. Habluetzel* 456 US 91, 102 S.Ct. 1549, 1553-1554, 71 L.Ed.2d 770 (1982), this Court enunciated the principle that the State, in granting the opportunity for illegitimate children to receive support, must not make the opportunity illusory, although it need not be conterminous with the procedures accorded legitimate children. This Court further held that demands of equal protection will not be satisfied if the restrictions placed, by the State, on the illegitimate child are not substantially related to a legitimate state interest.

Under Louisiana law, the husband of the mother of a legitimate child is presumed to be the father, although that presumption may be rebutted with evidence such as blood

grouping tests which show an exclusion. However, in the case of an illegitimate child seeking to establish paternity in Louisiana, the burden of proof in theory is "preponderance of the evidence".

The Louisiana Supreme Court in *Boudreaux v. American Insurance Company*, La., 264 So.2d 621 (1972) stated what the preponderance of the evidence means.

> Preponderance in law means credibility, influence, and weight and not the number of witnesses. Wilson v. Morris, La. App., 139 So.2d 93, cert. denied.
>
> By a preponderance of evidence is meant, simply, evidence which is of greater weight, or more convincing, than that which is offered in opposition to it; that is, evidence which as a whole shows that the fact or causation sought to be proved is more probable than not. *Town of Slidell v. Temple*, 246 La. 137, 164 So.2d 276, *Naquin v. Marquette Casualty Company*, 244 La. 569, 153 So.2d 395; *Perkins v. Texas and New Orleans Railroad Company*, 243 La. 829, 147 So.2d 646. This proof may be made not only by directed evidence, but also by circumstantial evidence which excludes other reasonable hypotheses with a fair amount of certainty. *Naquin v. Marquette Casualty Company*, supra. *Gassiott v. Gordey*, La. App., 182 So.2d 171 (1966). See, *Duhon v. Cormier*, La. App. 186 So.2d 645, 648.
>
> The law places the burden of proof on plaintiff to establish by a preponderance of the

> evidence the facts upon which she relies for judgment. The terms Preponderance of the evidence means that evidence or that part of the evidence which is of greater weight, which is more convincing and which best accords with reason and probability. A preponderance of the evidence may be said to be that part of the evidence which, because of its apparent correctness, its convincing nature, its quality or its weight, tips the scales in favor of the party upon whom the burden of proof rests. *Bailey v. Travelers Insruance Company*, La. App. 210 So.2d 93, writ refused, 252 La. 832, 214 So.2d 160 (1968).

In the case at bar, a widely recognized expert, Dr. Leslie Ray Bryant indicated a phenomenally high probability of paternity, 99.91%, which percentage *exceeds* the AMA-ABA joint guidelines, evidentiary formula of "practically proved". *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 Family Law Quarterly, 247 at 262 (1976).

The imposition of the burden of finding a probability of paternity greater than 99.91%, of refuting "first-time" experts (the petitioner being given no opportunity for an additional blood sample and having been denied the right to have rebuttal witnesses testify), and of discrediting a vasectomy defense where no documentary evidence was ever introduced by the respondent created an impenetrable barrier to the establishment of paternity. Further, the Fourth Circuit imposed yet another burden on the illegitimate by requiring a showing of a "romantic link" between the petitioner and respondent.

Justice Brennan while a state appellate court judge, observed:

> In the field of contested paternity. . . . the truth is so often obscured because social pressures create a conspiracy of silence or worse, induce deliberate falsity. *Cortese v. Cortese*, 10 NJ Super 152, 156, 76 A.2d 717, 719 (1950).

Because of the recognized problems of lack of eyewitnesses and self-serving testimony, the crucial testimony in all paternity proceedings should be that of well-qualified medical experts who follow the joint AMA-ABA guidelines. A meaningful opportunity to rebut medical evidence which excludes the putative father is a necessary procedural safeguard in granting the illegitimate child a *tangible*, not *illusory*, opportunity at establishing paternity.

III.

An illegitimate child living in Louisiana and suing there to establish paternity may not be held to an unreasonably higher standard of proof than illegitimate children in other states who are seeking to establish paternity without violating the Equal Protection Clause of the Fourteenth Amendment.

The enactment of 45 CFR 305.24 dealing with aid to families with dependent children, requires that each state, in order to receive federal funds, have written procedures for establishing paternity and identify laboratories which perform legally and medically acceptable blood tests which tend to confirm or refute paternity.

In response to this mandate, many jurisdictions have put into effect procedures for establishing paternity which virtually rely on the red blood cell and HLA testing alone to exclude or prove paternity. Notably, California has adopted a procedure where once a probability of paternity is found to

be at the 90th percentile or above, a finding of paternity is made, and a support order is issued. The putative father may rebut that evidence if he chooses, but the support obligation stays into effect until the court finds that he is not the father.

This Court in *Mills v. Habluetzel*, 102 S.Ct. at 1551 held that a statutory scheme which makes the status of illegitimacy an insurmountable obstacle to the vindication of rights violates equal protection principles. Further it was held that the opportunity could not be so truncated that only a few could utilize it effectively, and that the test for determining whether equal protection rights have been violated must be applied practically, not formalistically. *Mills v. Habluetzel*, 102 S.Ct. at 1553, 1555.

The federal government has set forth a law which mandates State compliance in order that the State may receive federal funds. Formalistically, Louisiana has complied. However, practically speaking, the burden of proof upon the illegitimate to establish paternity which Louisiana courts have chosen to impose is unreasonably higher than the burden imposed upon illegitimates in other jurisdictions and therefore, cannot be constitutionally maintained.

It is important to note that the procedure set forth in the federal regulations is applicable not only in welfare cases, but as well to non-welfare mothers seeking support.

IV.

The state law of Louisiana may not impose such constraints upon the proof of paternity so as to effectively emasculate the federal mandate of 45 C.F.R. 305.24.

The issue of the federal law's supremacy over state law comes into play here by practical, not formalistic application.

The Supremacy Clause of the United States Constitution states the laws of the United States shall be the supreme law of the land. The provisions and intent of 45 CFR 305.24 are clear: the federal government has a vested interest in seeing that procedures for determining paternity in every state are established, and where ever possible, fatherhood proven.

The Louisiana Courts, by establishing jurisprudential guidelines which create an unreasonably heavy burden of proof for illegitimates in paternity litigation, have in effect, made state law supercede the federal law.

CONCLUSION

For all of the foregoing reasons, a writ of certorari should issue to review the judgment of the Court of Appeals, Fourth Circuit, State of Louisiana.

Respectfully Submitted:

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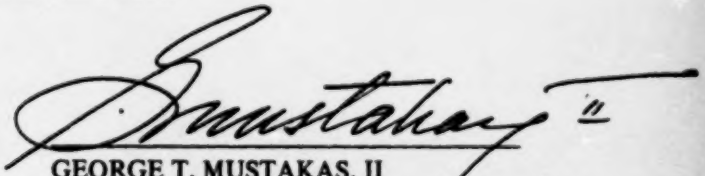
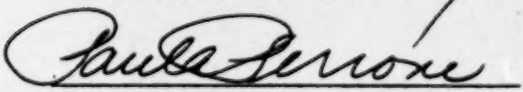
CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon counsel for respondents this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following:

Darleen Jacobs
828 St. Louis Street
New Orleans, Louisiana 70112



GEORGE T. MUSTAKAS, II



PAULA PERRONE

DATED FEBRUARY 7, 1984

A-1

Soula O'BANNON

VERSUS

Dr. Robert AZAR

No. CA-0514

Court of Appeal of Louisiana,
Fourth Circuit

July 8, 1983

Rehearing Denied Aug. 23, 1983

In the paternity action, the Civil District Court for the Parish of Orleans, Henry J. Roberts, Jr., J., entered judgment in favor of defendant, and plaintiff appealed. The Court of Appeal, Klees, J., held that: (1) as the trial court was not presented with any concrete evidence to show even a slight romantic link between plaintiff and defendant, as defendant was able to produce a witness who placed him in another state on one of the days of alleged intercourse, as he was also able to produce two witnesses that supported his contention that he had previously had a vasectomy, as one medical expert testified that, according to a certain type of blood test, defendant was not the child's father, and as defendant never acknowledged in any way the child born to plaintiff, it could not be said that the trial judge committed manifest error in making its decision of nonpaternity, and (2) the trial judge did not commit reversible error in his evidentiary rulings.

Affirmed.

1. Children Out-of-Wedlock key 53

As the trial court, in paternity proceeding, was not presented with any concrete evidence to show even a slight romantic link between plaintiff and defendant, as defendant was able to produce a witness who placed him in another state on one of the days of alleged intercourse, as he was also able to produce two witnesses that supported his contention that he had previously had a vasectomy, as one medical expert testified that, according to a certain type of blood test, defendant was not the child's father, and as defendant never acknowledged in any way the child born to plaintiff, it could not be said that the trial judge committed manifest error in making its decision of nonpaternity.

2. Children Out-of-Wedlock key 52

Burden of proof required of plaintiff in a paternity proceeding is to establish paternity by a preponderance of the evidence.

3. Appeal and Error key 1008.1(7)

Court of Appeal cannot disturb trial court's findings of fact unless it finds that the trial judge committed manifest error.

4. Children Out-of-Wedlock key 58

Since defense counsel, prior to paternity trial, filed a motion to perform blood tests and requested court to order a hemotologist to perform blood tests on defendant, plaintiff and the minor child, since that motion was granted and the tests performed, and since plaintiff's counsel thus had access to defendant's blood at that time to perform whatever tests she believed necessary, there was no error in the trial court's denial of plaintiff's motion, made during trial, to compel defendant to take other blood tests. LSA-R.S. 9:396.

5. Trial key 66

Absent a clear abuse of discretion, it is not error for trial judge to refuse to reopen case for additional evidence.

6. Trial key 66

To justify the granting of an application to reopen a case, prior to rendition of judgment, it must clearly appear that the applicant has used every effort within his means to procure the evidence before trial and, if there is doubt on the subject, it is to be resolved against the applicant.

7. Children Out-of-Wedlock key 58

Since there was sufficient opportunity to have certain physician conduct blood tests on plaintiff and minor child in order for said physician to testify as to the results during the paternity trial, and since, even if he had, the Court of Appeal did not believe that such testimony would have been sufficient to bring about a different result in the outcome of the trial, there was no error in the trial court's denial of plaintiff's posttrial, prejudgment rule to show cause why the testimony of said physician should not be admitted into evidence.

8. Witnesses key 276

Physician who, in paternity proceeding, was called to the stand in plaintiff's case-in-chief was not a representative or agent of defendant, which would have allowed plaintiff to invoke article allowing any party or his representative to be called as a witness and cross-examined by the adverse party without the latter vouching for his credibility; neither the relationship between that witness and the defendant as physician-patient nor their friendship created such a bond or agency as required for application of the aforsaid article.

LSA-C.C.P. art. 1634.

9. Witnesses key 321

When there is no indication that counsel has been surprised or dealt with hostilely by his own witness during direct examination, counsel is not entitled to impeach the witness. LSA-C.C.P. art 1634.

10. Trial key 62(3)

Admission of rebuttal evidence is largely within discretion of trial judge.

11. Trial key 62(3)

Since the proffer made by plaintiff's counsel, in paternity proceeding, as to what certain physician would say if allowed to testify was exclusively concerned with Human Leukocyte Antigen testing, since such material was either repetitive of another physician's testimony or information within that physician's expertise in the field of paternity, and since, furthermore, it appeared that the trial court would have reached the same conclusion even had the other physician testified, the trial court did not abuse its discretion in refusing to allow the rebuttal testimony. LSA-C.C.P. art. 1631.

Darleen M. Jacobs, A Professional Law Corporation, New Orleans, for defendant-appellee.

Paula Perrone, A Professional Law Corporation, New Orleans, for plaintiff-appellant.

Before KLEES, AUGUSTINE and LOBRANO, JJ.

KLEES, Judge.

In this paternity action, the plaintiff filed suit to have the defendant declared the natural father of her minor child. In addition, the plaintiff sought child support from the defendant. The trial court held that the defendant was not the father of the child. The plaintiff appeals, contending that the trial court erred in its determination that the defendant was not the father of the child. The plaintiff also asserts that the trial court committed error during the trial when it ruled on certain evidentiary and procedural matters.

In our review of the voluminous record of this case, we conclude that the trial judge did not commit manifest error in his determination of non-paternity. Additionally, we conclude that the trial judge did not commit any reversible errors in his evidentiary rulings. For these reasons, the decision of the trial court is affirmed.

FACTS

The plaintiff and defendant met in 1979 while both were tenants at the Pier Eight Apartments in New Orleans. The record reflects that the parties met primarily in the parking lot grounds of the complex due to the fact that their cars were often parked in close proximity. Both parties admit to these limited facts, however, almost all other facts are in dispute.

Plaintiff testified that she and defendant went out on one date when he escorted her to a Mexican Restaurant in the French Quarter. Furthermore, she alleged that she and the defendant had sexual intercourse in the defendant's apartment on three separate occasions, July 27, 1979, August 3, 1979 and August 21, 1979.

The defendant testified that he knew the plaintiff only as an assistant manager of the apartment complex. He stated that she frequently approached him with gossip concerning other tenants and she also discussed her own personal problems. Defendant denied that he ever went out on a date with plaintiff. Furthermore, he emphatically denied that he ever had sexual intercourse with the plaintiff. In support of this contention, the defendant offered, at trial, the sworn testimony of Dr. John Georgott who stated that the defendant was in San Francisco on July 27, 1979, one of the dates when the alleged sexual intercourse took place.

In addition, defendant argues that he could not possibly father a child due to the fact that he obtained a vasectomy which was performed by a physician and friend, Dr. Sharon West Doud. Defendant asserts that he obtained the vasectomy on April 7, 1979 in Westfield, New York. He explained at trial that he went to Dr. Doud in New York because he had a close personal and professional relationship with her and that he wanted to minimize the chance of anyone obtaining knowledge of the vasectomy.

The fact that defendant was contemplating a vasectomy was verified by Wilson Abraham, a close friend and associate.

Dr. Doud testified that she received a call from defendant in which he indicated that he had separated from his wife and desired a vasectomy. They proceeded to plan the operation for April 7, 1979, during a time when her husband would be away from home. She stated that she performed the vasectomy at her office in her home in Westfield, New York on April 7, 1979.

The seventeen-year-old daughter of Dr. Doud testified via deposition that she saw defendant in her home in New York and that she saw defendant and her mother go into the

examining room in her home.

Dr. Bernard Jacobs testified that defendant came to see him on June 6, 1979. At that time, he examined defendant and observed what appeared to be scars from a vasectomy. He also took a sperm count from him in June and July of 1979. Both counts were negative for sperm. Dr. Jacobs further stated that in his opinion, it was impossible for defendant to father any child due to the vasectomy and negative sperm counts.

The plaintiff questions whether the vasectomy was actually performed in New York at the time stated by defendant. Plaintiff points out that defendant was unable to produce any independent documentary evidence which would substantiate his trip to New York. Plaintiff also produced as a witness Robert Doud, the former husband of Dr. Sharon Doud, who testified that he was at his home in Westfield, New York during the period of time when defendant supposedly had the vasectomy and that defendant did not come to his home to have a vasectomy performed.

The issue of whether or not defendant actually had a vasectomy became relevant in the fall of 1979. At that time, defendant, who had moved from the Pier Eight Apartments, was contacted by plaintiff. She informed him that she was pregnant and claimed that he was the father of the child. When the plaintiff was questioned regarding the reaction of defendant, she testified that he was "dumbfounded".

Subsequent to this incident, defendant had a telephone conversation with Dr. Joseph Bellina, plaintiff's gynecologist. The defendant testified that Dr. Bellina called him. Dr. Bellina could not remember who initiated the call. During

the conversation, the general condition of plaintiff was discussed and Dr. Bellina recalled that defendant did not say anything to indicate that he was the father of the child.

On April 21, 1980, plaintiff was admitted to F. Edward Hebert Hospital for delivery. Shortly after the delivery of the child, a birth certificate was issued. On the certificate, the space for the name of the father was left blank. The defendant never signed the infant's birth certificate nor did he pay any medical expenses in connection with the child's birth.

In October of 1980, plaintiff filed a paternity suit. Blood tests were ordered by the court. The interpretation of these tests by the experts called during the trial are directly in conflict. The plaintiff called Dr. Leslie Ray Bryant, Jr., who was accepted by the court as an expert in paternity testing. This court, as did the trial court, notes the impressive credentials of Dr. Bryant as a paternity expert. After analyzing the HLA (Human Leukocyte Antigen) blood test results, Dr. Bryant was able to give the percentage of probability that the defendant is the natural father of the child. Dr. Bryant concluded that the probability of paternity was 99.91 per cent.

Dr. Andrew Hegre was commissioned to perform paternity testing for the defendant. The red blood cell typing showed approximately a 68% probability of paternity. However, according to Dr. Hegre the immunoglobin testing showed exclusion factors which indicated that the defendant could not have fathered the child. Also, Dr. Hegre criticized the accuracy of the HLA test performed by Dr. Bryant.

Plaintiff asserts that due to the 99.91 percent probability of paternity found by Dr. Bryant, the trial court committed manifest error in its determination of non-paternity. We disagree.

If the blood test results are viewed in isolation, this argument might have merit. However, the test results must be weighed along with all other evidence presented at trial.

An obvious assumption underlying the HLA paternity test, or any test for that matter, is that the mother and putative father have engaged in sexual intercourse at least once during the period of possible conception.

Susan Spears, a close friend of the plaintiff, testified that she saw the plaintiff and the defendant talking in the parking lot. Ms. Spears stated that the plaintiff told her that she was going to dinner with the defendant. This is the full extent of her testimony regarding the relationship between the plaintiff and the defendant.

Gloria Parkam, another friend of the plaintiff, was called to testify. Under cross-examination, she admitted that she had never actually seen the plaintiff and the defendant together.

Chester Booth, a former tenant at the Pier Eight Apartments, testified that he knew both the plaintiff and the defendant, but that he never saw them together on a social basis.

DID THE TRIAL COURT ERR IN ITS DETERMINATION OF NON-PATERNITY

[1] Considering the testimony of the above individuals, we find that the trial court was not presented with any concrete evidence to show even a slight romantic link between the plaintiff and the defendant.

[2, 3] The burden of proof required of the plaintiff is to establish paternity by a preponderance of the evidence.

Succession of Washington, 308 So.2d 892 (La.App. 1975). The trial court, after considering all of the conflicting testimony and after viewing the demeanor of the witnesses, concluded that the plaintiff failed to meet this burden. This court on appeal cannot disturb the trial court's findings of fact unless we find that the trial judge committed manifest error. *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973).

The trial court determined that defendant's version of the facts was the more credible one. The defendant was able to produce a witness who placed him in San Francisco on one of the days of the alleged intercourse. Defendant was also able to produce two witnesses that supported his contention that he had a vasectomy performed on April 7, 1979. The testimony of Dr. Jacobs showed that defendant had negative sperm counts prior to the alleged dates of intercourse with the plaintiff. Dr. John Linder testified that defendant had a negative sperm count subsequent to the alleged time of intercourse. Dr. Hegre testified that according to one type of blood test, defendant was not the father of the child. Finally, defendant never did acknowledge in any way the child born to the plaintiff. These facts strongly support the trial court's findings of non-paternity.

As further support, the defendant, in his brief, refers to the extensive history of health disorders of plaintiff. While the plaintiff's medical records are suggestive of emotional "problems" experienced by her, we note that the trial judge did not refer to these "problems" in his Reasons for Judgment. The trial judge failed to find a direct correlation between the plaintiff's health problems and the issue of paternity. We agree with his finding and in view of our holding below find it unnecessary to delineate the long medical history of the plaintiff.

Support for plaintiff is found solely in her testimony and in the testimony of Dr. Leslie R. Bryant, Jr. and Robert

Doud. It is obvious from the record that the credibility of Robert Doud was highly questionable. The trial judge obviously and properly did not give much weight to his testimony, Dr. Bryant's results are another matter and cannot be lightly dismissed, particularly due to his impressive credentials and scholarly testimony. However, given the conflicting testimony of Dr. Hegre and the fact that the plaintiff could not affirmatively show a romantic connection between herself and the defendant, we cannot say that the trial judge committed manifest error in making his decision.

PROCEDURAL ASSIGNMENTS OF ERROR

During the trial, plaintiff made a motion for a court to allow her to perform the same type of immunoglobulin tests that were done by Dr. Hegre. The court allowed her to have the test performed if the defendant would submit his blood. Defendant, however, refused to submit to the blood test. Plaintiff argues that the trial court erred in denying her motion to compel defendant to take the test.

The Uniform Act on Blood Tests to Determine Paternity, enacted in Louisiana under Revised Statute 9:396, provides as follows:

> Notwithstanding any other provision of the law to the contrary, in any civil action in which paternity is a relevant fact, or in an action en desaveu, the court, upon its own initiative or upon request made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of

> paternity against such party or enforce its order if the rights of others and the interests of justice so require.

[4] Prior to trial, defendant's counsel filed a Motion to Perform Blood Test to Establish Paternity and requested the court to order a hermatologist to perform blood tests on defendant, plaintiff and the minor child. This motion was granted by the court and the blood tests were performed pursuant to the order. Because this order included defendant, this court is of the opinion that there was compliance with LSA-R.S. 9:396. Plaintiff's counsel had access to defendant's blood at the time to perform whatever tests she believed necessary. Defendant cannot be forced to submit to further testing of his blood as often as opposing counsel desires. We can find no error in the trial court's action denying plaintiff's Motion to Compel.

After the trial, but prior to judgment, plaintiff filed a Rule to Show Cause why the testimony of Dr. Hebert Poleski should not be admitted into evidence. His testimony was to include his findings on immunoglobulin series tests which he performed on the plaintiff and the minor child. According to plaintiff, this testimony would prove that Dr. Hegre's findings on the same immunoglobulin series tests were erroneous and could not be scientifically substantiated. This motion was denied by the trial court and plaintiff argues that the trial court erred in not allowing this testimony.

[5] In the absence of a clear abuse of discretion, it is not error for a trial judge to refuse to reopen a case for additional evidence. *Skipworth v. McElroy Metal Mill, Inc.*, 353 So.2d 1069 (La.App. 2nd Cir. 1977).

[6] To justify the granting of an application to reopen a case, prior to rendition of judgment, it must clearly appear

that the applicant has used every effort within his means to procure the evidence before trial and, if there is doubt on the subject, it is to be resolved against the applicant. *Richey v. Swink*, 4 So.2d 749 (La.App. 2nd Cir. 1941).

[7] There was sufficient opportunity to have Dr. Poleski conduct tests in order for him to testify as to the results during the trial, and even if he had, this court does not believe that the testimony of Dr. Poleski would have been sufficient to bring about a different result in the outcome of the trial.

Plaintiff further argues that the trial judge erred in not allowing her to cross-examine Dr. Sharon Doud, a witness she had called to the stand in her case-in-chief, and in not allowing Robert M. Doud to testify to any facts which would impeach Sharon Doud.

Plaintiff bases her contention on La.C.C.P. art. 1634 which states:

> "Any party or his representative may be called as a witness and cross-examined by the adverse party without the latter vouching for his credibility, or being precluded from impeaching his testimony, and immediately thereafter the witness thus called may be examined or cross-examined to the extent otherwise permitted by law upon the subject matter of his examination in chief by such adverse party. The court may permit the recall and further cross-examination of the party or of his representatives as often as it deems such action to be in the interest of justice. 'Representative' as used in the paragraph above and in Article 1428(2) means an

> officer, agent or employee having supervision or knowledge of the matter in controversy, in whole or in part, whether or not he is in the employ of or connected with the party at the time his testimony is taken."

[8] We do not agree with the plaintiff's position that Dr. Sharon Doud was a representative or agent of defendant which would allow her to invoke the use of this article. Neither their relationship of physician-patient nor as friends creates such a bond or agency as required.

[9] When there is no indication that counsel has been surprised or dealt with hostility by a witness during direct examination, counsel is not entitled to impeach his own witness. *State v. Redwine*, 337 So.2d 1041 (La. 1976). Plaintiff's counsel failed to make any showing of surprise or hostility in Sharon Doud's testimony. Plaintiff called Doud as her own witness and is bound by her testimony. Thus we conclude that the trial court was correct in not allowing her to impeach that testimony.

Plaintiff further argues that the trial court erred in not allowing the rebuttal testimony of Dr. David deJongh and Dr. Tom Lane.

Plaintiff called Dr. David deJongh as a witness during her case on rebuttal, informing the court that the testimony of Dr. Hegre cast serious doubt on the reliability of the HLA testing. Dr. deJongh was to be presented as an HLA specialist to evaluate HLA testing and to rebut Dr. Hegre's testimony. The trial court held that Dr. deJongh's testimony would be repetitious because Dr. Bryant had conducted the HLA test and had testified as to his findings in the case-in-chief. The court stated that it would only allow an expert in the field of immunology to rebut the testimony of Dr. Hegre, and found that Dr. deJongh was not qualified as such.

However, the court informed the plaintiff that she could call Dr. Bryant back to testify to reaffirm his findings.

La.C.C.P. art. 1631 states in pertinent part:

> "The court has the power to require that the proceedings shall be conducted with dignity and in an orderly and expeditious manner, and to control the proceedings at the trial, so that justice is done."

[10] The admission of rebuttal evidence is largely within the discretion of the trial judge. *Balzar v. Missouri Pacific Railroad*, 406 So.2d 324 (La.App. 3rd Cir. 1981).

[11] The proffer made by plaintiff's counsel as to what Dr. deJongh would say if allowed to testify is exclusively concerned with the HLA testing. This material is either repetitive of Dr. Bryant's testimony or information within Dr. Bryant's expertise in the field of paternity. Nevertheless, upon examination of the proffered testimony, we conclude that based on the evidence in the record, the trial court would have reached the same conclusion had Dr. deJongh testified. Thus, we find that the trial court did not abuse its discretion by refusing to allow Dr. deJongh's rebuttal testimony.

Dr. John Thomas Lane was also called to the stand by plaintiff's counsel during rebuttal in an effort to rebut Dr. Hegre's testimony. The court refused to recognize him as an immunologist and would not allow him to testify. For the same reasons expressed above, we conclude that the trial court did not abuse its discretion in refusing to allow Dr. Lane to testify on rebuttal.

Accordingly, we affirm the decision of the trial court dismissing plaintiff's suit. All costs of this appeal to be borne by plaintiff.

AFFIRMED.

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION "B"
DOCKET #5

No. 80-16227

SOULA O'BANNON
VS
DR. ROBERT AZAR

JUDGMENT

This matter came for trial Jan. 28, 1982, Jan. 29, 1982, March 15, 1982, March 16, 1982, March 17, 1982, March 19, 1982 and April 2, 1982.

Present: Paula Perrone, attorney for Soula O'Bannon
Darleen Jacobs, attorney for Dr. Robert Azar

After hearing the evidence testimony, hearing the argument of counsel and reading the briefs submitted:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendant, Dr. Robert Azar and against the plaintiff, Soula O'Bannon, dismissing her suit at her cost.

JUDGMENT READ, RENDERED AND SIGNED in open Court May 10, 1982.

/s/ Henry J. Roberts, Jr.
JUDGE

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION "B"
DOCKET NO. 5

NO. 80-16227

SOULA O'BANNON
VS
DR. ROBERT AZAR

REASONS FOR JUDGMENT
Filed May 10, 1982

Plaintiff sued defendant alleging him to be the father of a child. Defendant denies any intercourse whatsoever as to plaintiff and then denies the allegation that he is the father of the child.

This, therefore, refines itself down to a question of determination of paternity based upon the perponderance of all of the evidence presented.

1) Plaintiff alleges intercourse on three separate occasions and dates.

2) Defendant denies all intercourses and specifically the dates alleged.

3) Defendant alleges a vasectomy done on April 7, 1979 and answers the other allegations considered by a denial that he could not physically produce a child.

4) The plaintiff attempted to disprove the vasectomy on the date in question.

5) Plaintiff submitted along with defendant and child to blood tests; the results are in conflict.

a) Dr. Byrant using the H. L. A. testing cannot exclude paternity.

b) Dr. Hegre using the other testing type of blood group does not hesitate excluding paternity.

1) Thus, there is a conflict in the testimony of the medical experts.

Plaintiff relies upon several witnesses to show closeness only or friendship to defendant, but nothing which would indicate actual view of intercourse. They were not impressive nor did they aid the Court in determining paternity.

Defendant relies upon witnesses who place him away from plaintiff during the alleged times of intercourse, plus the fact of negative sperm count after April 17 to indicate inability to produce an off-spring.

Defendant alleges he did nothing which would indicate acknowledgment of the child -- no money, gift, etc. Plaintiff indicates defendant agreed to pay all costs and further advised an abortion, which defendant denied.

This Court must, therefore, take all the evidence and testimony and conclude from the admissible evidence the fact of paternity or non-paternity. As in all cases the plaintiff bears the burden on proof, i.e. going forward with the evidence. That burden does not shift. Here the plaintiff falls short of maintaining that burden of proof. This Court observed the witnesses, watched their demeanor, and can only conclude that having failed to carry that burden the plain-

tiff's suit must be dismissed at her cost.*

/s/ Henry J. Roberts, Jr.
JUDGE

*This Court was the original trier of the facts in the recent decided case of *Mock v Mock* No. 81-2146-SupCt - March1, 1982 (not reported yet). While this Court can criticize the Supreme Court on several grounds on this case, let it first be stated that in *Mock v Mock* the burden of proof, i.e. or going forward with the evidence, was the responsibility of the defendant *husband*. In interpreting Article 187 La. C.C. the Supreme Court appeared to be holding the line where a marriage was in existance in order not to basterdize a child. This appears to be the theory of *Mock v Mock*. One can criticize *Mock v Mock* further because while the Court made reference to other tests, it did not remand the case for a possible blood grouping of the husband. The theory of *Mock v Mock* is correct once it is understood that in *Mock v Mock* a marriage was still in effect. In the instant case there is no marriage-husband relationship, and, therefore, the burden of proof does not shift to the defender, but remains with the party bringing the action.

FILED
MAR 10 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-1322

In the Supreme Court of the United States

OCTOBER TERM, 1983

SOULA O'BANNON

PETITIONER

VERSUS

DR. ROBERT AZAR

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL, FOURTH CIRCUIT,
STATE OF LOUISIANA AND
A MOTION TO VACATE THE JUDGMENT BELOW

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.) Whether the Uniform Act on Blood Tests To Determine Paternity, enacted as Louisiana Revised Statute 9:936 *et seq.*, affords all parties with a meaningful opportunity to be heard on all salient aspects of the litigation, as applied to the case at bar.

2.) Whether illegitimate children in Louisiana are deprived of a meaningful opportunity to obtain parental support in accord with Equal Protection under the Fourteenth Amendment.

3.) Whether illegitimate children in Louisiana are held to an unreasonably higher standard of proof in paternity proceedings as illegitimates from other jurisdictions.

4.) Whether the regulations governing availability of aid to federal funds to the states found in 45 Code of Federal Regulations 305.24 applies to proceedings where the state is not a party, where no claim to public assistance is asserted, and where the sole issue is a paternity dispute between private litigants.

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NO. 83-1322

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

SOULA O'BANNON

PETITIONER

VERSUS

DR. ROBERT AZAR

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL, FOURTH CIRCUIT,
STATE OF LOUISIANA AND
A MOTION TO VACATE THE JUDGMENT BELOW

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Respondent respectfully prays that this Court deny the petition for a Writ of Certiorari in the instant case. The decisions in the courts below are fully supportable by the facts and evidence adduced. Petitioner's assertions to the contrary, the decisions in the Louisiana courts in this matter rest fully and adequately on independent state grounds so as to mandate denial of the Writ of Certiorari. Respondent urges that the courts below fully considered and

correctly adjudicated the controlling issues in this case, and that the issues presented here are so devoid of merit such that review in the Supreme Court is unnecessary. Many issues now presented to this Court are mere questions of state law evidence requirements and fact determinations which will not support review by the Court. Finally respondent submits that certain issues were not properly presented and preserved below, or, if properly raised below, are not properly presented by the facts of record. Respondent believes that the issues presented by petitioner are so frivilious and devoid of merit that this Court must deny this Writ of Certiorari.

OPINIONS BELOW

This exhaustively litigated case was first tried in the Civil District Court for the Parish of Orleans, State of Louisiana on January 28th and 29th, March 15th, 16th, 17th and 19th, 1982, and April 2, 1982. This case bore the number 80-16227 on the docket of that Court; and was finally adjudicated on May 10, 1982. Trial was twice delayed while the petitioner, SOULA O'BANNON, sought supervisory interlocutory writs from the Fourth Circuit Court of Appeal.

O'BANNON lodged her appeal with the Fourth Circuit Court of Appeal, State of Louisiana (Docket No. CA-0514). The Court of Appeal, at 435 So.2d 1144 (La. App. 4th Cir. 1983), affirmed the decision of the trial court based on the merits of the case. Judgment in affirmation was rendered on July 8, 1983.

The Louisiana Supreme Court denied petitioner's application for a Writ of Certiorari to review the final judgment of the Court of Appeal. The supervisory writ was

denied by the Louisiana Supreme Court unanimously without opinion at 441 So.2d 749 (La. 1983). The docket number in the Louisiana Supreme Court was 83-C-2026; the decision was rendered November 11, 1983. Both opinions appear as an appendix to this brief.

JURISDICTION

This petition for a Writ of Certiorari is prayed for in accordance with 28 U.S.C. 1257(3), seeking a review of a state court determination in favor of the validity of state statute when faced with a federal constitutional attack. However, respondent urges that here the petitioner has failed to specify the stage of the proceedings in both the trial and appellate courts where the federal questions for which she seeks review were raised, the method and manner of raising them, and the way in which they were disposed in the lower courts, all in accordance with Rule 21(1)(h) of the Rules of this Court. Thus respondent submits that petitioner has failed to show that her federal questions were timely and properly raised so as to give this Court jurisdiction to review the judgment on a Writ of Certiorari in accordance with 28 U.S.C. 1257(3).

STATUTES INVOLVED

Louisiana Revised Statutes 9:936 *et seq.*:

396. Authority for test

> Notwithstanding any other provision of law to the contrary, in any civil action in which paternity is a relevant fact, or in an acation en desaveu, *the court, upon its own initiative* or upon request made by or on behalf of any person whose blood is involved may, *or upon motion of any party to*

the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

397. Selection of expert

The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of court, the results of which may be offered in evidence. *The number and qualifications of such experts shall be determined by the court.*

397.2 Effect of test results

If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. *If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence.* If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type. (Emphasis added).

STATEMENT OF THE CASE

Petitioner filed this paternity action in New Orleans, Louisiana on October 22, 1980, in the Civil District Court for the Parish of Orleans. Petitioner, an unmarried woman, sought to have DR. ROBERT AZAR, a divorced physician with no children from his marriage, adjudged the father of her illigitimate child, BENJAMIN O'BANNON, who was born April 22, 1980 in New Orleans. DR. AZAR is an eye surgeon of international repute, a pioneer in the development of soft contact lenses for opthomalic complaints. Evidence adduced that O'BANNON and AZAR were once residents at the same New Orleans apartment complex and they occasionally parked their automobiles in adjacent spaces. In addition, O'BANNON sought to gain an order to have DR. AZAR provide financial support for her illegitimate son.

Respondent immediately and consistently denied that he could be the father of BENJAMIN O'BANNON. DR. AZAR pointed to a physical inability to procreate, owing to a vasectomy performed by Dr. Sharon Doud of New York State in April, 1979. In June and July of 1979, Dr. Bernard Jacob found evidence of a scar consistent with the vasectomy procedure, as well as *negative sperm count*, on the part of respondent. Petitioner, in applying for review to this court, has failed to bring the attention of the Court to such powerful evidence of non-paternity.

Instead, petitioner sought to discredit the testimony of Dr. Doud about the vasectomy procedure itself. Respondent submits that whatever the testimony of Dr. Doud, clear and convincing independent medical testimony exists to show that DR. AZAR was incapable of siring children after July, 1979.

Respondent has never admitted the siring of BENJAMIN O'BANNON at anytime, whether formally or informally. His name does not appear on the birth certificate, he never provided any monetary support to either the child or the mother, nor did he admit to *ever* having had sexual relations with SOULA O'BANNON.

Petitioner at first alleged intercourse with DR. AZAR on three separate occasions, those being July 27, 1979; August 3, 1979; and August 21, 1979. Later, she recanted to state that the last date of alleged intercourse was on August 3, 1979. Dr. John Georgot came forward with testimony to conclusively place respondent in San Francisco, California on the first date of alleged intercourse, July 27, 1979.

SOULA O'BANNON and BENJAMIN O'BANNON both have blue eyes with straight blonde hair. DR. AZAR is of Lebanese-Semitic origin, has kinky black hair, black eyes, and sworthy features. Respondent urges that there is a complete lack of common physical resemblance between himself and BENJAMIN O'BANNON.

Petitioner at trial was unable to produce any independent testimony to establish any links between herself and DR. AZAR except for brief casual meetings in the complex parking lot. No evidence, except for O'BANNON's self-serving testimony, exists to establish any social or sexual relations between herself and respondent.

The trial court ordered that all parties submit to blood testing in accordance with Louisiana Revised Statute 9:936 *et. seq.* Two types of tests were conducted, each by a different expert.

Petitioner's expert, Dr. Leslie Bryant, conducted a Human Leukcyte Antigen Test (hereinafter HLA). On the basis of this exclusion test, Dr. Bryant found that there was a 99.91% possibility that DR. AZAR *could* have fathered BENJAMIN O'BANNON, or in other words, that DR. AZAR's blood type was similar to the father of the O'BANNON child.

Defendant's expert, Dr. Andrew Hegre, performed an immunoglobulin test, or red blood cell test, on the parties. Dr. Hegre found, and testified to, a 68% possibility that DR. AZAR could have fathered the O'BANNON child. However, Dr. Hegre found in his examination the presence of two (2) distinct exclusion factors which he testified conclusively showed that DR. AZAR could not have fathered the child, irregardless of any sperm count testing.

Petitioner sought at trial to bring forward two expert witnesses to rebut the testimony of Dr. Hegre. These experts were not listed in any pre-trial documents; and were not permitted to testify by the trial judge.

Petitioner would have this Court find reversible error in the refusal of the trial court's refusal to allow her to bring forward further expert testimony at the eleventh hour (petitioners request came on the last day of trial). However, she fails to point out that the trial court specifically informed petitioner's counsel that any necessary rebuttal testimony could be given by Dr. Leslie Bryant, petitioner's paternity test expert. Petitioner failed to bring forward Dr. Bryant in rebuttal, and now asks this court to find error. Respondent submits that to allow such eleventh hour tactics would have unfairly prejudiced his

own procedural rights. In any event, respondent urges that blood test evidence aside, petitioner was unable to establish her claim given the totality of the circumstances which surround this case. SOULA O'BANNON's attending physician and gynecologist, Dr. Joseph Belina, testified that BENJAMIN O'BANNON's conception took place on August 10, 1979. Since O'BANNON herself testified that the last alleged copulation between herself and respondent, occurred at least a week before that date, it is clear that DR. AZAR did not sire BANJAMIN O'BANNON from petitioner's own evidence.

SOULA O'BANNON was shown at trial to have an extensive history of mental disorders. She has previously been diagnosed as a manic depressive. She has been hospitalized for this condition on several occasions.

Testimony at trial revealed that the petitioner, although unmarried, repeatedly tried to become pregnant. She even took fertility pills to that end. Her physician testified that she received an abortion in 1975. Petitioner herself testified that she never had an abortion.

Petitioner has previously been treated for veneral diseases. She noticed a venereal wart just prior to BENJAMIN's birth. Respondent meanwhile has never suffered from any type of venereal disease. Surely if sexual relations had occurred, respondent would have contracted O'BANNON's venereal disease.

At trial, judgment was rendered in favor of DR. AZAR. O'BANNON's paternity claim was dismissed. This decision was affirmed by the appellate court.

REASONS FOR DENYING THE WRIT

"It is a wise father who knows his own child"
Shakespeare
The Merchant of Venice
Act II, Scene 2

"Thou seest that I no issue have"
Shakespeare
Henry VI, Part One
Act III, Scene 5

I.

Whether the Uniform Act on Blood Tests to Determine Paternity, enacted as Louisiana Revised Statute 9:936 et. seq., affords all parties with a meaningful opportunity to be heard on all salient aspects of the litigation, as applied to the case at bar.

That the due process right as determined by this court has far-reaching and flexible parameters is uncontroverted by respondent. *Morrissey vs. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), *Boddie vs. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 371 (1971).

This Court, in *Mathews vs. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), specified the three distinct factors to be enumerated in order to determine the specific dictates of due process as applied to state action. However, respondent asserts that the standard applied in *Mathews* is inappropriate where there has been no state action beyond providing private litigants with a statutory mechanism that allows blood tests to be performed. Nowhere does the statute purport to definitively decide the issue of paternity against a putative father solely on the

basis of blood tests. As this Court noted in *Mills vs. Harbluetzel*, 456 U.S. 91, 92 S.Ct. 1549, 71 L.Ed. 770 (1982(:

> "Traditional blood tests do not determine paternity. They prove non-paternity, excluding from the class of possible fathers a high percentage of the general male population. Krause, Illegitimacy: Law and Social Policy 123-136 (1971). Thus the fact that a certain male is not excluded by these tests does not prove that he is the child's natural father, only that he is a member of the limited class of possible fathers .... Whatever evidentiary rule the courts of a particular state choose to follow, if the blood test evidence does not exclude a certain male, he must thereafter turn to more conventional forms of proof—evidence of lack of access to the mother, his own testimony, the testimony of others—to prove that, although not excluded by the blood test, he is not in fact the child's father."

102 S.Ct. at 1554, footnote 4 by Justice Rehnquist for a unanimous Court (1982).

Respondent asserts that this is precisely the situation in the case at bar. He has proved via conventional evidence that he had no access to the mother, that he was physically incapable of procreation; and that he had no social or sexual relations with petitioner whatsoever. Thus, the evidence shows an adequate and independent state ground for the determination of this case, despite the HLA test data supplied by Dr. Leslie Bryant *and* the immunogolobul test exclusion found by Dr. Andrew Hegre. The United States Supreme Court does not review judgments of the State Courts that rest on adequate and independent state grounds. *Murdock vs. Memphis*, 87 U.S.

(20 Wall) 590, 636, 22 L.Ed. 429 (1875); *Herb vs. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945). As Justice Harlan observed for the Court in *Herb, supra*,

> "Our only power over state judgments is to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal law, our review could amount to nothing more than an advisory opinion."

92 S.Ct. at 463 (1945).

Petitioner finds error in the trial courts refusal to allow her to cross examine Dr. Sharon Doud about the vasectomy she allegedly performed in April, 1979, on respondent, on the grounds that she was a representative of the respondent. What petitioner *fails* to tell this Court, is that *she*, not respondent, called Dr. Doud to testify. Dr. Doud appeared not as respondent's "representative" but as an independent medical witness. It is abundantly clear that the dictates of Louisiana Code of Civil Procedure Article 1634 were properly applied to the case at bar.

Petitioner would find error in the trial courts refusal to allow her to call new eleventh-hour medical experts to rebut the testimony of Dr. Hegre, and to show that Dr. Hegre was incompetent. Whatever Dr. Hegre's qualifications, and he is a board-certified immunologist, respondent insists that the totality of the evidence shows that he could not possibly have fathered BENJAMIN O'BANNON as asserted by petitioner.

This Court, in *Little vs. Streater,* 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1980) recognized that the imposition of child support requires procedural fairness. By allowing petitioner to make unnecessary rebuttal testimony would be to violate respondent's procedural rights given the overwhelming gravity of his independent evidence, and would be disruptive of the concept of judicial economy. As Louisiana R.S. 9:937 provides, the court is the final arbiter of the number of qualifications of expert witnesses. Petitioner fails to tell this Court that despite the refusal to allow new experts, the trial court clearly gave petitioner the right to recall Dr. Leslie Bryant, who is a nationally recognized paternity expert, to rebut any testimony by Dr. Hegre.

II.

Whether illegitimate children in Louisiana are deprived of a meaningful opportunity to obtain parental support in accord with Equal Protection under the Fourteenth Amendment.

This Court, in *Mills vs. Harbluetzel, supra,* rules that a state which grants illegitimate children the right to receive support may not make such opportunities illusory. The procedures need not be coterminous however with those accorded legitimate children. 102 S.Ct. at 1553. Now petitioner asks this court to find an equal protection clause violation merely because Louisiana requires that the plaintiff who asserts paternity of an illegitimate against a putative father prove that claim by a mere *preponderence* of the evidence. Such an assertion is purely ridiculous. Clearly, for any other lower standard of proof to be applied would violate a defendant father's own equal protection rights. Dr. Leslie Bryant found a high percentage of

possibility that respondent *could* have sired BENJAMIN O'BANNON. Now petitioner seeks to bootstrap this mere possibility into conclusive proof of paternity. Petitioner asserts that this incredible principle is in accordance with the Joint AMA-ABA guidelines in paternity cases espoused in *Joint AMA-ABE Guidelines: Present Status of Serological Testing in Problems of Disputed Parentage*, 10 Fam. L. Q. 247 (1976). However, respondent fails to point out that even the most sophisticated blood examination must of necessity be predicated on the assumption that sexual relations occurred between the mother and putative father. "The probability of paternity ... is based on the important assumption that the accused had intercourse with the other and has at least a 50% chance of being the father. Peterson, A Few Things You Should Know About Paternity (But Were Afraid To Ask), 22 Santa Clara L. Rev. 667, 669 (1982).

Petitioner has failed to establish even the slightest sexual link between herself and respondent. The more tender phrasing of "romantic link" used by Judge Klees of the Louisiana Fourth Circuit Court of Appeal in its decision should not be misinterpreted by this Court. To have sired BENJAMIN O'BANNON, respondent *must* have had intercourse with the mother. This has not been established on the record. Unless petitioner seeks to advance a theory of immaculate conception, the conclusion is inescapable that DR. AZAR is not the father of BENJAMIN O'BANNON, whatever the possibilities found by Dr. Bryant. While medical testimony about blood groupings and exclusion factors are clearly probative to the issue of paternity, such evidence cannot replace more conventional evidence completely, especially given the important assumptions basic to such tests.

III.

Whether illegitimate children in Louisiana are held to an unreasonably higher standard of proof in paternity proceedings as illegitimates from other jurisdictions.

Louisiana, like seven other jurisdictions, has adopted *in toto* the provisions of the Uniform Act on Blood Test To Determine Paternity, with minor variations. Louisiana Revised Statutes 9:936 *et. seq.* Other states to have adopted the act are:

Jurisdiction	Statutory Citation
California	California Evid. Code Sec. 890-7 (Deering 1983)
Illinois	Ill. Ann. Stat. Ch. 40 Para. 1401-7 (Smith-Hurd (1983))
New Hampshire	N.H. Rev. Stat. Ann. Sec. 522.1-522.10
Oklahoma	Okla. Stat. Ann. Tit. 10, Sec. 501-8 (West 1983)
Oregon	Ore. Rev. Stat. Sec. 109.250-109.262 (1983)
Pennsylvania	Penn. Stat. Ann. Tit. 42, Sec. 6131-7 (Purdon 1983)
Utah	Utah Code Ann. Sec. 78-25-18 to 75-25-23 (1953)

Many other jurisdictions have similar provisions without naming the Uniform Act. Illustrative of this are:

Jurisdiction	Statutory Citation
Georgia	Ga. Code Ann. Sec. 74-306 (1982)
Indiana	Ind. Code Ann. Sec. 31-6-6.1-8 (Burns 1983)
Massachusetts	Mass. Ann. Laws Ch. 373 Sec. 12A (Michie/Law. Co-op. 1983)
New York	N.Y. Fam. Ct. Act. Sec. 532 (McKinney 1983)
Texas	Tex. Fam. Code Ann. Sec. 13.02 *et. seq.* (Vernon 1983)

Each state surveyed, which allows for blood testing to determine paternity issues, provides that in the case of disagreements between the experts, the case goes to the court or jury on all the evidence. Most states allow the evidence of blood test results to be included, as does Louisiana (Illinois would exclude *all* blood test evidence when there is a disagreement).

Respondent here did submit to the blood test upon court order, as provided in the statute. Here, respondent refused, and the court upheld this refusal, to submit to further, identical tests which petitioner sought *after the trial.* This result is consistent with jurisdictions faced with demands by a party that second tests be performed. See *People ex. rel. Hawthorne vs. Hamilton,* 292 N. E. 563 (Ill. App. 3rd Dist. (1983)), where the court ruled that a defendant may not be compelled to submit to additional blood testing, 292 N. E. 2d at 565-6; and *People ex. rel. Yarn vs. Yarn,* 392 N. E. 2d 606 (Ill. App. 1st Dist. 1979), where the court ruled that a defendant could be subjected to

additional blood testing only on the judge's discretion. 392 N. E. 2d at 608.

Petitioner now makes a vague assertion that 45 Code of Federal Regulations 305.24, which requires states to have written procedures for paternity testing in order to receive federal funds, support her view that Louisiana has placed a higher standard of proof on illegitimates than does other jurisdictions. Such a position is clearly untenable. 45 C.F.R. 305.24 clearly does not apply to this case where the state is not a party and where no public assistance is sought by the mother of the child.

Petitioner also asserts that because California would allow support payments from putative fathers where blood tests reveal a 90% possibility of paternity until such time as a judicial determination of paternity is made supports her argument that Louisiana illegitimates are unfairly treated. This contention will not survive scrutiny. Merely because one jurisdiction has adopted such a rule, it is not incumbent on all states to follow suit. The Federal Constitution does not give to this Court the power to overturn state legislation or remedies under the guise of constitutional interpretation because the Justices believe they can provide better rules. *Labine vs. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288, *reh. den.*, 402 U.S. 990, 91 St. Ct. 1672, 29 L.Ed.2d 156 (1971). Further, this issue is here raised by petitioner for the first time. In a federal system, it is important that state courts be given the first opportunity to consider the applicability of the state statutes and procedures in light of constitutional challenge. *Cardinale vs. Louisiana*, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969). An issue not properly raised and preserved in the courts below will not be ripe for Supreme Court review. The United States Supreme Court cannot

decide issues raised for the first time on certiorari review of a state court decision. *Tacon vs. Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973).

IV.

Whether the regulations governing availability of federal funds found in 45 Code of Federal Regulations 305.24 applies to proceedings where the state is not a party, where no claim for public assistance is asserted, and where the sole issue is a paternity dispute between private litigants.

Petitioner, *de novo*, asserts that Louisiana law imposes such constraints on proof of paternity so as to "effectively emasculate" the provisions of 45 C.F.R. 305.24.

Despite the failure of petitioner to properly raise and preserve this issue below, respondent feels that this assertion has no merit in the context of the instant case. 45 C.F.R. was enacted to standardize laboratory procedures for paternity determinations to those states which receive federal funds for public assistance. It was not intended to prescribe the methods used by private litigants where there is no claim for public assistance asserted, as in this case. While the Surpemacy Clause provides generally that federal statutes and regulations promulgated under federal statutory authority are the supreme law of the land, U.S. Constitution Article 6, Cl. 2, petitioner had made no showing that Louisiana has violated the Supremacy Clause's provisions. Louisiana has merely provided a statutory scheme by which paternity blood tests are permitted, whether in private litigation or public assistance cases. No "emasculation" can occur where there is no valid evidentiary showing of paternity. Furthermore, despite no showing by petitioner that there exists a contrary state law or

procedure to 45 C.F.R. 305.24, it must be established that the federal regulations are themselves constitutionally valid as promulgated and enforced. *United States vs. City of St. Louis,* 452 F. Supp. 1147 (E.D. Mo. 1978). Petitioner here has made no such showing. In addition, petitioner has failed to establish the invalidity of the state regulation or statute in accordance with the constitutional balancing test of *Florida Lime and Avocado Growers vs. Paul,* 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) where this Court ruled that the question is one of whether both the state and federal regulations can be enforced without impairing the federal supermacy of the field. 83 S.Ct. at 1217.

Such a showing is not present here. Petitioner can assert no valid link between 45 C.F.R. 305.24 and the Louisiana practice of allowing private litigants in a paternity action to have blood tests performed. The federal regulations merely standardizes the laboratories which may perform those tests in public assistance cases, 45 C.F.R. 305.24 (d). Since this case does not involve public assistance funds, the regulation cannot apply. Furthermore, petitioner has failed to prove or assert that the laboratories which were used to perform the blood tests in the instant case did not qualify under 45 C.F.R. 205.24(d).

CONCLUSION

Respondent urges that there exist fully adequate and independent state grounds to support the decision below irrespective of petitioner's constitutional objections. The issues here contained are matters of state law evidence and procedure which are not subject to Supreme Court review in that they rest on state law grounds. Finally, respondent submits that certain issues raised here were not properly

presented and reserved so as to support review by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel for Respondent hereby certifies that service of this Brief in Opposition has been made on petitioner's counsel of record on this date, in accordance with law, by depositing copies of same in the United States Mail, postage prepaid, to the following:

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DATED MARCH 9, 1984

APPENDIX "A"

Soula O'BANNON

VERSUS

Dr. Robert AZAR

No. CA-0514

Court of Appeal of Louisiana
Fourth Circuit

July 8, 1983

Rehearing Denied Aug. 23, 1983

In the paternity action, the Civil District Court for the Parish of Orleans, Henry J. Roberts, Jr., J., entered judgment in favor of defendant, and plaintiff appealed. The Court of Appeal, Klees, J., held that: (1) as the trial court was not presented with any concrete evidence to show even a slight romantic link between plaintiff and defendant, as defendant was able to produce a witness who placed him in another state on one of the days of alleged intercourse, as he was also able to produce two witnesses that supported his contention that he had previously had a vasectomy, as one medical expert testified that, according to a certain type of blood test, defendant was not the child's father, and as defendant never acknowledged in any way the child born to plaintiff, it could not be said that the trial judge committed manifest error in making its decision of nonpaternity, and (2) the trial judge did not commit reversible error in his evidentiary rulings.

Affirmed.

KLEES, Judge.

In this paternity action, the plaintiff filed suit to have the defendant declared the natural father of her minor child. In addition, the plaintiff sought child support from the defendant. The trial court held that the defendant was not the father of the child. The plaintiff appeals, contending that the trial court erred in its determination that the defendant was not the father of the child. The plaintiff also asserts that the trial court committed error during the trial when it ruled on certain evidentiary and procedural matters.

In our review of the voluminous record of this case, we conclude that the trial judge did not commit manifest error in his determination of non-paternity. Additionally, we conclude that the trial judge did not commit any reversible errors in his evidentiary rulings. For these reasons, the decision of the trial court is affirmed.

FACTS

The plaintiff and defendant met in 1979 while both were tenants at the Pier Eight Apartments in New Orleans. The record reflects that the parties met primarily in the parking lot grounds of the complex due to the fact that their cars were often parked in close proximity. Both parties admit to these limited facts, however, almost all other facts are in dispute.

Plaintiff testified that she and defendant went out on one date when he escorted her to a Mexican Restaurant in the French Quarter. Furthermore, she alleged that she and the defendant had sexual intercourse in the defendant's apartment on three separate occasions, July 27, 1979, August 3, 1979 and August 21, 1979.

The defendant testified that he knew the plaintiff only as an assistant manager of the apartment complex. He stated that she frequently approached him with gossip concerning other tenants and she also discussed her own personal problems. Defendant denied that he ever went out on a date with plaintiff. Furthermore, he emphatically denied that he ever had sexual intercourse with the plaintiff. In support of this contention, the defendant offered, at trial, the sworn testimony of Dr. John Georgott who stated that the defendant was in San Francisco on July 27, 1979, one of the dates when the alleged sexual intercourse took place.

In addition, defendant argues that he could not possibly father a child due to the fact that he obtained the vasectomy on April 7, 1979 in Westfield, New York. He explained at trial that he went to Dr. Doud in New York because he had a close personal and professional relationship with her and that he wanted to minimize the chance of anyone obtaining knowledge of the vasectomy.

The fact that defendant was contemplating a vasectomy was verified by Wilson Abraham, a close friend and associate.

Dr. Doud testified that she received a call from defendant in which he indicated that he had separated from his wife and desired a vasectomy. They proceeded to plan the operation for April 7, 1979, during a time when her husband would be away from home. She stated that she performed the vasectomy at her office in her home in Westfield, New York on April 7, 1979.

The seventeen-year-old daughter of Dr. Doud testified via deposition that she saw defendant in her home home in New York and that she saw defendant and her

mother go into the examining room in her home.

Dr. Bernard Jacobs testified that defendant came to see him on June 6, 1979. At that time, he examined defendant and observed what appeared to be scars from a vasectomy. He also took a sperm count from him in June and July of 1979. Both counts were negative for sperm. Dr. Jacobs further stated that in his opinion, it was impossible for defendant to father any child due to the vasectomy and negative sperm counts.

The plaintiff questions whether the vasectomy was actually performed in New York at the time stated by defendant. Plaintiff points out that defendant was unable to produce any independent documentary evidence which would substantiate his trip to New York. Plaintiff also produced as a witness Robert Doud, the former husband of Dr. Sharon Doud, who testified that he was at his home in Westfield, New York during the period of time when defendant supposedly had the vasectomy and that defendant did not come to his home to have a vasectomy performed.

The issue of whether or not defendant actually had a vasectomy became relevant in the fall of 1979. At that time, defendant, who had moved from the Pier Eight Apartments, was contacted by plaintiff. She informed him that she was pregnant and claimed that he was the father of the child. When the plaintiff was questioned regarding the reaction of defendant, she testified that he was "dumbfounded".

Subsequent to this incident, defendant had a telephone conversation with Dr. Joseph Bellina, plaintiff's gynecologist. The defendant testified that Dr. Bellina called him. Dr. Bellina could not remember who initiated the

call. During the conversation, the general condition of plaintiff was discussed and Dr. Bellina recalled that defendant did not say anything to indicate that he was the father of the child.

On April 21, 1980, plaintiff was admitted to F. Edward Hebert Hospital for delivery. Shortly after the delivery of the child, a birth certificate was issued. On the certificate, the space for the name of the father was left blank. The defendant never signed the infant's birth certificate nor did he pay any medical expenses in connection with the child's birth.

In October of 1980, plaintiff filed a paternity suit. Blood tests were ordered by the court. The interpretation of these tests by the experts called during the trial are directly in conflict. The plaintiff called Dr. Leslie Ray Bryant, Jr., who was accepted by the court as an expert in paternity testing. This court, as did the trial court, notes the impressive credentials of Dr. Bryant as a paternity expert. After analyzing the HLA (Human Leukocyte Antigen) blood test results, Dr. Bryant was able to give the percentage of probability that the defendant is the natural father of the child. Dr. Bryant concluded that the probability of paternity was 99.91 per cent.

Dr. Andrew Hegre was commissioned to perform paternity testing for the defendant. The red blood cell typing showed approximately a 68% probability of paternity. However, according to Dr. Hegre the immunoglobin testing showed exclusion factors which indicated that the defendant could not have fathered the child. Also, Dr. Hegre criticized the accuracy of the HLA test performed by Dr. Bryant.

Plaintiff asserts that due to the 99.91 percent probability of paternity found by Dr. Bryant, the trial court committed manifest error in its determination of non-paternity. We disagree.

If the blood test results are viewed in isolation, this argument might have merit. However, the test results must be weighed along with all other evidence presented at trial.

An obvious assumption underlying the HLA paternity test, or any test for that matter, is that the mother and putative father have engaged in sexual intercourse at least once during the period of possible conception.

Susan Spears, a close friend of the plaintiff, testified that she saw the plaintiff and the defendant talking in the parking lot. Ms. Spears stated that the plaintiff told he that she was going to dinner with the defendant. This is the full extent of her testimony regarding the relationship between the plaintiff and the defendant.

Gloria Parkam, another friend of the plaintiff, was called to testify. Under cross-examination, she admitted that she had never actually seen the plaintiff and the defendant together.

Chester Booth, a former tenant at the Pier Eight Apartments, testified that he knew both the plaintiff and the defendant, but that he never saw them together on a social basis.

DID THE TRIAL COURT ERR IN ITS DETERMINATION OF NON-PATERNITY

[1] Considering the testimony of the above individuals, we find that the trial court was not presented with any concrete evidence to show even a slight romantic link between the plaintiff and the defendant.

[2, 3] The burden of proof required of the plaintiff is to establish paternity by a preponderance of the evidence. *Succession of Washington*, 308 So.2d 892 (La.App. 1975). The trial court, after considering all of the conflicting testimony and after viewing the demeanor of the witnesses, concluded that the plaintiff failed to meet this burden. This court on appeal cannot disturb the trial court's findings of fact unless we find that the trial judge committed manifest error. *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973).

The trial court determined that defendant'ss version of the facts was the more credible one. The defendant was able to produce a witness who placed him in San Francisco on one of the days of the alleged intercourse. Defendant was also able to produce two witnesses that supported his contention that he had a vasectomy performed on April 7, 1979. The testimony of Dr. Jacobs showed that defendant had negative sperm counts prior to the alleged dates of intercourse with the plaintiff. Dr. John Linder testified that defendant had a negative sperm count subsequent to the alleged time of intercourse. Dr. Hegre testified that according to one type of blood test, defendant was not the father of the child. Finally, defendant never did acknowledge in any way the child born to the plaintiff. These facts strongly support the trial court's findings of non-paternity.

As further support, the defendant, in his brief, refers

to the extensive history of health disorders of plaintiff. While the plaintiff's medical records are suggestive of emotional "problems" experienced by her, we note that the trial judge did not refer to these "problems" in his Reasons for Judgment. The trial judge failed to find a direct correlation between the plaintiff's health problelms and the issue of paternity. We agree with his finding and in view of our holding below find it unnecessary to delineate the long medical history of the plaintiff.

Support for plaintiff is found solely in her testimony and in the testimony of Dr. Leslie R. Bryant, Jr. and Robert Doud. It is obvious from the record that the credibility of Robert Doud was highly questionable. The trial judge obviously and properly did not give much weight to his testimony, Dr. Bryant's results are another matter and cannot be lightly dismissed, particularly due to his impressive credentials and scholarly testimony. However, given the conflicting testimony of Dr. Hegre and the fact that the plaintiff could not affirmatively show a romantic connection between herself and the defendant, we cannot say that the trial judge committed manifest error in making his decision.

PROCEDURAL ASSIGNMENTS OF ERROR

During the trial, plaintiff made a motion for a court to allow her to perform the same type of immunoglobulin tests that were done by Dr. Hegre. The court allowed her to have the test performed if the defendant would submit his blood. Defendant, however, refused to submit to the blood test. Plaintiff argues that the trial court erred in denying her motion to compel defendant to take the test.

The Uniform Act on Blood Tests to Determine

Paternity, enacted in Louisiana under Revised Statute 9:396, provides as follows:

> Notwithstanding any other provision of the law to the contrary, in any civil action in which paternity is a relevant fact, or in an action en desaveu, the court, upon its own initiative or upon request made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

[4] Prior to trial, defendant's counsel filed a Motion to Perform Blood Test to Establish Paternity and requested the court to order a hermatologist to perform blood tests on defendant, plaintiff and the minor child. This motion was granted by the court and the blood tests were performed pursuant to the order. Because this order included defendant, this court is of the opinion that there was compliance with LSA-R.S. 9:396. Plaintiff's counsel had access to defendant's blood at the time to perform whatever tests she believed necessary. Defendant cannot be forced to submit to further testing of his blood as foten as opposing counsel desires. We can find no error in the trial court's action denying plaintiff's Motion to Compel.

After the trial, but prior to judgment, plaintiff filed a Rule to Show Cause why the testimony of Dr. Hebert Poleski should not be admitted into evidence. His testimony was to include his findings on immunoglobulin series tests which he performed on the plaintiff and the

minor child. According to plaintiff, this testimony would prove that Dr. Hegre's findings on the same immunoglobulin series tests were erroneous and could not be scientifically substantiated. This motion was denied by the trial court and plaintiff argues that the trial court erred in not allowing this testimony.

[5] In the absence of a clear abuse of discretion, it is not error for a trial judge to refuse to reopen a case for additional evidence. *Skipworth v. McElroy Metal Mill, Inc.*, 353 So.2d 1069 (La.App. 2nd Cir. 1977).

[6] To justify the granting of an application to reopen a case, prior to rendition of judgment, it must clearly appear that the applicant has used ever effort within his means to procure the evidence before trial and, if there is doubt on the subject, it is to be resolved against the applicant. *Richey v. Swink*, 4 So.2d 749 (La.App. 2nd Cir. 1941).

[7] There was sufficient opportunity to have Dr. Poleski conduct tests in order for him to testify as to the results during the trial, and even if he had, this court does not believe that the testimony of Dr. Poleski would have been sufficient to bring about a different result in the outcome of the trial.

Plaintiff further argues that the trial judge erred in not allowing her to cross-examine Dr. Sharon Doud, a witness she had called to the stand in her case-in-chief, and in not allowing Robert M. Doud to testify to any facts which would impeach Sharon Doud.

Plaintiff bases her contention on La.C.C.P. art. 1634 which states:

> "Any party or his representative may be called as a witness and cross-examined by the adverse party without the latter vouching for his credibility, or being precluded from impeaching his testimony, and immediately thereafter the witness thus called may be examined or cross-examined to the extent otherwise permitted by law upon the subject matter of his examination in chief by such adverse party. The court may permit the recall and further cross-examination of the party or of his representatives as often as it deems such action to be in the interest of justice. 'Representative' as used in the paragraph above and in Article 1428(2) means an officer, agent or employee having supervision or knowledge of the matter in controversy, in whole or in part, whether or not he is in the employ of or connected with the party at the time his testimony is taken."

[8] We do not agree with the plaintiff's position that Dr. Sharon Doud was a representative or agent of defendant which would allow her to invoke the use of this article. Neither their relationship of physician-patient nor as friends creates such a bond or agency as required.

[9] When there is no indication that counsel has been surprised or dealt with hostility by a witness during direct examination, counsel is not entitled to impeach his own witness. *State v. Redwine*, 337 So.2d 1041 (La. 1976). Plaintiff's counsel failed to make any showing of surprise or hostility in Sharon Doud's testimony. Plaintiff called Doud as her own witness and its bound by her testimony. Thus we conclude that the trial court was correct in not allowing her to impeach that testimony.

Plaintiff further argues that the trial court erred in not allowing the rebuttal testimony of Dr. David deJongh

and Dr. Tom Lane.

Plaintiff called Dr. David deJongh as a witness during her case on rebuttal, informing the court that the testimony of Dr. Hegre cast serious doubt on the reliability of the HLA testing. Dr. deJongh was to be presented as an HLA specialist to evaluate HLA testing and to rebut Dr. Hegre's testimony. The trial court held that Dr. deJongh's testimony would be repetitious because Dr. Bryant had conducted the HLA test and had testified as to his findings in the case-in-chief. The court stated that it would only allow an expert in the field of immunology to rebut the testimony of Dr. Hegre, and found that Dr. deJongh was not qualified as such. However, the court informed the plaintiff that she could call Dr. Bryant back to testify to reaffirm his findings.

La.C.C.P. art. 1631 states in pertinent part:

> "The court has the power to require that the proceedings shall be conducted with dignity and in an orderly and expeditious manner, and to control the proceedings at the trial, so that justice is done."

[10] The admission of rebuttal evidence is largely within the discretion of the trial judge. *Balzar v. Missouri Pacific Railroad*, 406 So.2d 324 (La.App. 3rd Cir. 1981).

[11] The proffer made by plaintiff's counsel as to what Dr. deJongh would say if allowed to testify is exclusively concerned with the HLA testing. This material is either repetitive of Dr. Bryant's testimony or information within Dr. Bryant's expertise in the field of paternity. Nevertheless, upon examination of the proffered testimony, we conclude that based on the evidence in the record, the trial court would have reached the same conclusion had Dr. deJongh testified.

Thus, we find that the trial court did not abuse its discretion by refusing to allow Dr. deJongh's rebuttal testimony.

Dr. John Thomas Lane was also called to the stand by plaintiff's counsel during rebuttal in an effort to rebut Dr. Hegre's testimony. The court refused to recognize him as an immunologist and would not allow him to testify. For the same reasons expressed above, we conclude that the trial court did not abuse its discretion in refusing to allow Dr. Lane to testify on rebuttal.

Accordingly, we affirm the decision of the trial court dismissing plaintiff's suit. All costs of this appeal to be borne by plaintiff.

AFFIRMED.

APPENDIX "B"

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION "B"
DOCKET #5

No. 80-16227

SOULA O'BANNON
VS
DR. ROBERT AZAR

JUDGMENT

This matter came for trial Jan. 28, 1982, Jan. 29, 1982, March 15, 1982, March 16, 1982, March 17, 1982, March 19, 1982 and April 2, 1982.

Present: Paula Perrone, attorney for Soula O'Bannon
Darleen Jacobs, attorney for Dr. Robert Azar

After hearing the evidence testimony, hearing the argument of counsel and reading the briefs submitted:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendant, Dr. Robert Azar and against the plaintiff, Soula O'Bannon, dismissing her suit at her cost.

JUDGMENT READ, RENDERED AND SIGNED in open Court May 10, 1982.

/s/ Henry J. Roberts, Jr.
JUDGE

APPENDIX "C"

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION "B"
DOCKET #5

No. 80-16227

SOULA O'BANNON
VS
DR. ROBERT AZAR

REASONS FOR JUDGMENT
Filed May 10, 1982

Plaintiff sued defendant alleging him to be the father of a child. Defendant denies any intercourse whatsoever as to plaintiff and then denies the allegation that he is the father of the child.

This, therefore, refines itself down to a question of determination of paternity based upon the perponderance of all of the evidence presented.

1) Plaintiff alleges intercourse on three separate occasions and dates.

2) Defendant denies all intercourses and specifically the dates alleged.

3) Defendant alleges a vasectomy done on April 7, 1979 and answers the other allegations considered by a denial that he could not physically produce a child.

4) The plaintiff attempted to disprove the vasectomy on the date in question.

5) Plaintiff submitted along with defendant and child to blood tests; the results are in conflict.

a) Dr. Bryant using the H.L.A. testing cannot exclude paternity.

b) Dr. Hegre using the other testing type of blood group does not hesitate excluding paternity.

1) Thus, there is a conflict in the testimony of the medical experts.

Plaintiff relies upon several witnesses to show closeness only or friendship to defendant, but nothing which would indicate actual view of intercourse. They were not impressive nor did they aid the Court in determining paternity.

Defendant relies upon witnesses who place him away from plaintiff during the alleged times of intercourse, plus the fact of negative sperm count after April 17 to indicate inability to produce an off-spring.

Defendant alleges he did nothing which would indicate acknowledgement of the child—no money, gift, etc. Plaintiff indicates defendant agreed to pay all costs and further advised an abortion, which defendant denied.

This Court must, therefore, take all the evidence and testimony and conclude from the admissible evidence the fact of paternity or non-paternity. As in all cases the plaintiff bears the burden on proof, i.e. going forward with the evidence. That burden does not shift. Here the plaintiff falls short of maintaining that burden of proof. This Court observed the witnesses, watched their demeanor, and can

only conclude that having failed to carry that burden the plaintiff's suit must be dismissed at her cost.*

/s/ Henry J. Roberts, Jr.
JUDGE

*This Court was the original trier of the facts in the recent decided case of *Mock v Mock* No. 81-2146-SupCt - March 1, 1982 (not reported yet). While this Court can criticize the Supreme Court on several grounds on this case, let it first be stated that in *Mock v Mock* the burden of proof, i.e. or going forward with the evidence, was the responsibility of the defendant *husband.* In interpreting Article 187 La. C.C. the Supreme Court appeared to be holding the line where a marriage was in existance in order not to basterdize a child. This appears to be the theory of *Mock v Mock.* One can criticize *Mock v Mock* further because while the Court made reference to other tests, it did not remand the case for a possible blood grouping of the husband. The theory of *Mock v Mock* is correct once it is understood that in *Mock v Mock* a marriage was still in effect. In the instant case there is no marriage-husband relationship, and, therefore, the burden of proof does not shift to the defender, but remains with the party bringing the action.